

7.1069. In view of the foregoing, the Panel dismisses Panama's claim under Article XI:1 of the GATT 1994 because measure 3 (transaction valuation based on transfer prices), being fiscal in nature, is not covered by that provision.

7.4.5 Argentina's defence under Article XX(d) of the GATT 1994

7.4.5.1 Main arguments of the parties

7.4.5.1.1 Argentina

7.1070. In the event that the Panel should find that Argentina acted inconsistently with Articles I:1, III:4 and XI:1 of the GATT 1994 with respect to the measures in question, Argentina argues that it has shown that its measures are justified under Article XX(d) of the GATT 1994. To this end, Argentina incorporates for reference the arguments it provided in relation to Article XIV(c) of the GATS as a basis for concluding that the treatment it applies to the entry of funds as an unjustified increase in wealth (measure 2) and its transaction valuation regime based on transfer price methodologies (measure 3) are "necessary to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994.¹³⁵⁹

7.4.5.1.2 Panama

7.1071. In response to Argentina's defence under Article XX(d) of the GATT 1994, Panama argues that Argentina has invoked that provision without even identifying the specific laws or regulations with which it is sought to secure compliance through the application of the transfer pricing regime. According to Panama, without this basis, it is impossible to establish whether the measure in question is intended, or necessary, to achieve the compliance objective protected under Article XX(d) of the GATT 1994.¹³⁶⁰

7.1072. Panama argues that the application of the presumption of unjustified increase in wealth (measure 2)¹³⁶¹ and the transfer pricing regime (measure 3)¹³⁶², on the basis of a list of cooperative countries that does not correspond to objective criteria with respect to countries that face like conditions with regard to tax transparency and information exchange, constitutes a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail.

7.4.5.2 Assessment by the Panel

7.1073. We recall that, in the event of measure 2 being found to be inconsistent with Article I:1 of the GATT 1994 and measure 3 inconsistent with Articles I:1, III:4 and/or XI:1 of the GATT 1994, Argentina invokes the exception under Article XX(d) of the GATT 1994 to justify both measures.¹³⁶³ Having dismissed Panama's claims under Article I:1 of the GATT 1994 (in relation to measure 2 and measure 3) and under Articles III:4 and XI:1 of the GATT 1994 (in relation to measure 3), the Panel refrains from ruling on whether these measures are covered under the exception provided for in Article XX(d) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As set out in greater detail above, the Panel *finds* that, with respect to the Panel's terms of reference:

- a. the replacement of Decree No. 1344/1998, as amended by Decree No. 1037/2000, by Decree No. 589/2013 does not prevent us from examining the eight measures at issue in the light of the system introduced by Decree No. 589/2013, in which a distinction is made between cooperative and non-cooperative countries;

¹³⁵⁹ Argentina's second written submission, para. 101.

¹³⁶⁰ Panama's second written submission, paras. 2.384 and 2.493.

¹³⁶¹ Panama's second written submission, para. 2.385.

¹³⁶² Panama's second written submission, para. 2.493.

¹³⁶³ Argentina's first written submission, para. 746. See also second written submission, para. 101.

- b. measure 5 (requirements relating to reinsurance services), as elaborated by Article 4 of SSN Resolution No. 35.794/2011 and in conformity with the amendment introduced by SSN Resolution No. 38.284/2014, forms part of the Panel's terms of reference;
- c. measure 5 (requirements relating to reinsurance services) covers only reinsurance services and therefore does not cover retrocession services.

8.2. With respect to the claims made by Panama under the GATS, the Panel *finds* as follows:

- a. having determined that Panama has demonstrated that there is trade in services and that the eight measures at issue in the present dispute are measures "affecting trade in services" within the meaning of Article I:1 of the GATS, the GATS is applicable to measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 5 (requirements relating to reinsurance services), measure 6 (requirements for access to the Argentine capital market), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement);
- b. measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 5 (requirements relating to reinsurance services), measure 6 (requirements for access to the Argentine capital market), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are inconsistent with Article II:1 of the GATS because they do not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries;
- c. measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), and measure 4 (payment received rule for the allocation of expenditure) are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes in which Argentina has undertaken specific commitments;
- d. measure 1 (withholding tax on payments of interest or remuneration), measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices), measure 4 (payment received rule for the allocation of expenditure), measure 7 (requirements for the registration of branches) and measure 8 (foreign exchange authorization requirement) are not covered under the exception of Article XIV(c) of the GATS because their application constitutes arbitrary and unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS;
- e. measure 5 (requirements relating to reinsurance services) and measure 6 (requirements for access to the Argentine capital market) are not covered by paragraph 2(a) of the Annex on Financial Services because they were not taken for prudential reasons within the meaning of that provision.

8.3. Further in relation to Panama's claims under the GATS, the Panel *dismisses* Panama's claim under Article XVI:2(a) of the GATS because measure 5 (requirements relating to reinsurance services) is not covered by that provision, inasmuch as it does not regulate service suppliers within the meaning of Article XVI:2(a) of the GATS.

8.4. The Panel also *dismisses* Panama's claim under Article XVI:1 of the GATS with respect to measure 5 (requirements relating to reinsurance services) because Panama has failed to establish a *prima facie* case of inconsistency in this respect.

8.5. Moreover, as we have found that measure 2 (presumption of unjustified increase in wealth), measure 3 (transaction valuation based on transfer prices) and measure 4 (payment received rule

for the allocation of expenditure) are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes in which Argentina has undertaken specific commitments, the Panel *refrains from ruling* on whether these measures are covered under the exception provided for in Article XIV(d) of the GATS.

8.6. With respect to Panama's claims under the GATT 1994:

- a. the Panel *dismisses* Panama's claim under Article I:1 of the GATT 1994, because Panama has failed to demonstrate that measure 2 (presumption of unjustified increase in wealth) constitutes a "rule and formality in connection with exportation" or "a charge imposed on the international transfer of payments for ... exports" within the meaning of Article I:1 of the GATT 1994;
- b. the Panel also *dismisses* Panama's claim under Article I:1 of the GATT 1994, because Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) constitutes "a matter referred to in Article III:4" or "a rule and formality in connection with exportation or importation" within the meaning of Article I:1 of the GATT 1994;
- c. likewise, the Panel *dismisses* Panama's claim under Article III:4 of the GATT 1994, because Panama has failed to demonstrate that measure 3 (transaction valuation based on transfer prices) is a matter referred to in Article III:4 of the GATT 1994;
- d. the Panel also *dismisses* Panama's claim under Article XI:1 of the GATT 1994, because measure 3 (transaction valuation based on transfer prices), being fiscal in nature, is not covered by that provision.

8.7. Finally, also with respect to Panama's claims under the GATT 1994, having dismissed Panama's claims under Article I:1 of the GATT 1994 (in relation to measure 2 – presumption of unjustified increase in wealth – and measure 3 – transaction valuation based on transfer prices) and Articles III:4 and XI:1 of the GATT 1994 (in relation to measure 3 – transaction valuation based on transfer prices), the Panel *refrains from ruling* on whether these measures are covered under the exception provided for in Article XX(d) of the GATT 1994.

8.8. In accordance with the provisions of Article 19.1 of the DSU, having found Argentina's actions to be inconsistent with its obligations under Article II:1 of the GATS, we recommend that the DSB request Argentina to bring its measures into conformity with its obligations under the GATS.
